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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970.

No. 551

ARTHUR JOSEPH AVEY and LARRY RICHARD DEAN, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Arthur Joseph Avey and Larry Richard Dean respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, affirming their conviction under 21 U.S.C. § 176a, for knowingly receiving, concealing and facilitating the transportation and concealment of

marijuana which had been illegally imported into the United States.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals not yet reported appears in the Appendix. A copy of the Order denying the petitioners request for a rehearing en banc by the Ninth Circuit also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 10, 1970. A timely Petition for Rehearing En Banc was denied on July 17, 1970, and this Petition for Certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the presumption of the fact of illegal importation of marijuana

from proof of possession authorized by 21 U.S.C. § 176a, violates the petitioners rights of due process, trial by jury and freedom from compulsory self-incrimination and destroys the presumption of innocence.

2. Whether the mandatory penalty of five years imprisonment for first offenders under 21 U.S.C. § 176a, with no possibility of suspension or probation of sentence constitutes cruel and unusual punishment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ARTICLE III. - THE JUDICIARY

§2. * * *

* * *

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but

when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. (U.S.C. Constitution Page 7.)

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

(U.S.C. Constitution Page 297.)

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence. (U.S.C. Constitution Page 4.)

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (U.S.C. Constitution Page 178.)

21 U.S.C. § 176a (See Appendix.)

STATEMENT OF THE CASE

Petitioners were convicted in the United States District Court for the District of Arizona, Tucson Division, upon a jury verdict of knowingly receiving, concealing and facilitating the transportation and concealment of marijuana which had been illegally imported into the United States in violation of 21 U.S.C. § 176a. The marijuana which formed the basis of the Government's case was found by Immigration Patrol Inspectors during an examination of the motor vehicle in which petitioners

were traveling in a random check for aliens. Petitioners' vehicle was stopped at approximately 7:30 p.m. as it was traveling in a northerly direction on U. S. Highway 89, commonly known as the Tucson-Nogales Highway, approximately twelve miles north of the Mexican-International Border. At the conclusion of the evidence, the trial judge properly instructed the jury that in order to secure a conviction, the Government had to prove that each petitioner (1) knowingly received or concealed or facilitated the transportation or concealment of marijuana which (2) was illegally imported and which (3) each knew was illegally imported. In accordance with the presumption authorized by 21 U.S.C. § 176a, the Court then instructed the jury, over the objection of petitioners' counsel, that:

> "I instruct you that if from the evidence you find beyond a reasonable doubt that the Government's Exhibits 1 through 48 contain marijuana, and if you find beyond a reasonable doubt further that such marijuana was seized by Government officers within the State of Arizona, then from these findings you would be authorized to draw the inference and to find that the marijuana was imported into the United States of America contrary to law."

On appeal to the Ninth Circuit, petitioners challenged the constitutionality of the presumption of illegal importation authorized by 21 U.S.C. § 176a, and assigned the giving of the above instruction as error.

In rejecting petitioners' argument, the Ninth Circuit applied the "more likely than not test" enunciated in Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), to certain statistical data set forth in Leary, supra, along with information obtained from John E. Ingersoll,

Director, Bureau of Narcotics and Dangerous Drugs, and concluded:

> "The importation presumption under consideration here, in contrast, rests upon the objective, convincing evidence that far more than half of the marihuana smoked in the United States - perhaps more than ninety percent - is illegally imported into the country."

REASONS FOR GRANTING THE WRIT

1. THE PRESUMPTION OF THE FACT OF ILLEGAL IMPORTATION OF MARIJUANA FROM PROOF OF POSSESSION AUTHORIZED BY 21 U.S.C. § 176a, VIOLATES THE PETITIONERS' RIGHTS OF DUE PROCESS, TRIAL BY JURY AND FREEDOM FROM COMPULSORY SELF-INCRIMINATION AND DESTROYS THE PRESUMPTION OF INNOCENCE.

This petition squarely raises the question expressly left unanswered in Leary, supra, where the Court said:

> "Consequently, we do not reach the question of the validity of the illegal importation inference." (23 L.Ed.2d 82)

Assuming arguendo the propriety of the judicial test employed by the Ninth Circuit, the correctness of its decision

is still open to serious question. If the basis on which this Court, in Leary, supra, held the statutory inference of "knowledge of illegal importation" is considered, petitioners submit that the inference of illegal importation is likewise unconstitutional. In Leary, supra, this Court surveyed the available data concerning the proportion of marijuana imported as against that grown domestically, and concluded that possessors of marijuana could not be aware of the proportion actually imported because:

> "* * *a significant percentage of domestically consumed marihuana may not have been imported at all * * *."
> (23 L.Ed.2d at 87)

and:

> "* * *a not inconsiderable proportion of domestically consumed marihuana appears to have been grown in this country* * *."
> (23 L.Ed.2d at 91)

Similarly, in United States v. Adams,

293 F.Supp. 776 (S.D.N.Y. 1968), at Page 781, the Court found:

> "There is a respectable body of expert authority for the view that most marihuana found in this country has been smuggled in from a foreign country. There are respectable views to the contrary. Congress could have reasonably have accepted the former view. But nobody can say with confidence how closely it accords with the facts." (Emphasis supplied.)

And, as stated in Adams, supra, at Page 780:

> "Both 'experts' of one kind or another and laymen are made conscious of the intensive concern of police officials over domestically grown marihuana as the 'raw materials' for domestic use of this narcotic. In this and other ways, there arises a widespread belief that the widely prevalent use of marihuana is supplied in substantial measures by domestic growth. Professor Schultes reported truthfully his judgment (whether correct or not, it is scarcely possible to know) that the marihuana so widely grown everywhere in the United States is the source of that smoked by most users in this country."

On the basis of this judicially recognized data, petitioners fail to comprehend how the Ninth Circuit could conclude that there is a rational connection between possession of marijuana and the fact that such marijuana has been illegally imported, or how that Court could conclude that the marijuana in question was "more likely than not" illegally imported into the United States.

The presumption of illegal importation from possession is not valid respecting marijuana, precisely because in the words of this Court, there is "significant percentage", and "not inconsiderable proportion" of marijuana that is grown domestically. Clearly, it cannot logically be concluded, as it was in Turner v. United States, ___ U.S. ___, 24 L.Ed.2d 610, 90 S.Ct. ___ (1970),

concerning heroin, that "all or nearly all" marijuana consumed in the United States is illegally imported.

There are, however, more compel reasons why the decision of the Ninth Circuit should be reviewed.

First, even assuming that the presumption of illegal importation met the tests of "rational connection" or "more likely than not", such presumption cannot meet the criminal standard of guilt beyond a reasonable doubt. The question raised here was expressly left open by the Ninth Circuit and by this Court in Leary, supra.

Under 21 U.S.C. § 176a, importation is one of the essential elements of the crime, and the Court so instructed the jury. Thus, the fact of the illegal importation must be established as every other essential fact in a criminal case

must be, that is, beyond a reasonable doubt. The jury, however, was instructed they were permitted to infer illegal importation from the mere proof of possession of marijuana within the State of Arizona. In view of the now judicially recognized statistical data relating to the quantity of domestically grown marijuana, it defies common sense to conclude that a presumption of illegal importation may ever rise to the level of beyond a reasonable doubt. Where a majority of possessors cannot be said to know the source of their marijuana, what jury or court can presume, beyond a reasonable doubt, that any particular quantity of marijuana found in a person's possession was domestically or foreign grown?

In effect, the jury was told that if you find petitioners possessed mari-

juana beyond a reasonable doubt, you may infer illegal importation beyond a reasonable doubt. Such presumption fails to satisfy the criminal reasonable doubt standard. See: Turner, supra.

Secondly, the utilization of the statutory presumption authorized by 21 U.S.C. § 176a, and sanctioned by the Ninth Circuit herein, has substantially destroyed certain Constitutional safeguards provided the petitioners as criminal accused. Specifically, these safeguards are the right to due process, to trial by jury, to be confronted with the witnesses against him, to freedom from compulsory self-incrimination, and the right to be presumed innocent until proven guilty beyond a reasonable doubt. In support of this argument, petitioners respectfully refer this Court to Mr. Justice Black's dissent in Turner v.

United States, supra; his concurrence in Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); his dissent in United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1964); his concurrence in United States v. Romano, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965), and his concurrence in Leary, supra.

Hence, in Turner, supra, 24 L.Ed.2d at Pages 632-633, Justice Black stated:

> "It is my belief that these statutory presumptions are totally unconstitutional for yet another reason, and it is a crucially important one. As discussed earlier, the Constitution requires that the defendant in a criminal case be presumed innocent and it places the burden of proving guilt squarely on the Government. Statutory presumption such as those involved in this case rob the defendant of at least part of his presumed innocence and cast upon him the burden of proving that he is not guilty. . .Presumptions of both forms tend to coerce and compel the defendant

> into taking the witness stand in his own behalf, in clear violation of the accused's Fifth Amendment privilege against self-incrimination."

During the course of trial; there was no evidence introduced by the Government relating to the source of the marijuana in question, nor did the Government introduce any statistical data relating to the percentage of foreign grown marijuana found in the United States from which the jury could assess the reasonableness of the presumption which they were authorized to draw. Rather, the jury was instructed that the mere possession of marijuana within the State of Arizona was sufficient evidence to justify conviction.

Effectively, the Government was relieved of proving the essential elements of its case by a mere Congressional declaration that certain evidence would be deemed sufficient to convict. The

burden of negating the presumption of illegal importation was thus placed upon the petitioners and upon their failure to take the witness stand to explain the source of the questioned marijuana, their conviction was assured.

To place the petitioners in such a posture is clearly repugnant to the Constitutional provisions set forth above.

2. THE MANDATORY PENALTY OF FIVE YEARS IMPRISONMENT FOR FIRST OFFENDERS UNDER 21 U.S.C. § 176a, WITH NO POSSIBILITY OF SUSPENSION OR PROBATION OF SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Clearly, the concept of what constitutes "cruel" and the "unusualness" of punishment fluctuates with the changing thoughts of society. Thus, it is from the subjective viewpoint of modern society that a five year prison term for a marijuana offense should be judged.

Ex Parte Pickens, 101 F.Supp. 285 (D.C. Alaska 1951); Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910).

Considering the large percentage of the United States population which is reported daily in the news media to be or to have been using marijuana, the medical controversy over the effects of marijuana use, the legislation recently enacted in Canada and proposed by both Federal and State authorities concerning the reduction in sentences prescribed for marijuana offenses, petitioners submit that a minimum sentence of five years imprisonment without the possibility of suspension or probation, bears no reasonable or realistic relation to the nature of the offense committed. Such a sentence is co-equivalent with and from a practical point of view,

often actually more severe than that imposed for most crimes of violence.

Petitioners, therefore, submit that the penalty prescribed by 21 U.S.C. § 176a is gravely disproportionate to the offense committed and, hence, constitutionally tainted. Hemans v. United States, 163 F.2d 228 (6th Cir. 1947), cert. den. 332 U.S. 801, 92 L.Ed. 380, rehearing den. 332 U.S. 821, 68 S.Ct. 152, 92 L.Ed.397; Jordan v. Fitzharris, 257 F.Supp. 674 (D.C. Cal. 1966).

CONCLUSION

For the reasons set forth above, petitioners respectfully submit that a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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F I L E D
June 10, 1970
WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ARTHUR JOSEPH AVEY and LARRY RICHARD DEAN, Defendants-Appellants.	No. 24,730

Appeal from the United States District Court for the District of Arizona

Before: JERTBERG, CARTER and TRASK, Circuit Judges.

TRASK, Circuit Judge:

This is an appeal from appellants' convictions at jury trial on one count of knowingly concealing eighty pounds of marihuana after it had been imported into the United States contrary to law and with appellants' knowledge, in violation

of 21 U.S.C. §176a.

The relevant facts of the case are as follows: A United States Customs official testified at trial that at approximately 5:30 P.M. on February 23, 1969, appellants drove a 1955 station wagon across the Mexican-American border at Nogales, Arizona. He made a thorough search of the vehicle and discovered no contraband although he recognized the odor of marihuana in the vehicle. More than two hours later, appellants passed a check point set up by two inspectors of the Immigration and Naturalization Service on the Nogales-Tucson highway some twelve miles north of Nogales. The officials testified that they stopped appellants' vehicle to search for aliens not lawfully admitted into the United States.[1/] Shining a flashlight into the back of the station wagon, one inspector

observed in plain sight several packages wrapped in red cellophane and protruding from under a canvas tarp. The inspector lifted the tarp and discovered more packages. Suspecting that the packages contained contraband, the inspectors radioed for a customs agent who arrived twenty minutes later and, breaking open one of the packages, identified the contents as marihuana and placed appellants under arrest.

Appellants were convicted after trial on May 28, 1969. We affirm.

(1) Self-incrimination

Appellants first assert that their conviction should be reversed because legal possession of marihuana would require declaration and invoicing [2/] and such acts would violate their constitutional privilege against self-incrimination. We have previously re-

jected this argument. United States v. Vansant, ___ F.2d ___ (9th Cir. Mar. 24, 1970); Witt v. United States, 413 F.2d 303 (9th Cir.), cert. denied, 396 U.S. 932 (1969). See also Walden v. United States, 417 F.2d 698 (5th Cir. 1969). Moreover, the plea of self-incrimination addressed to Count II of the indictment filed under 26 U.S.C. 4744 (a) was sustained by the District Judge during trial and Count II was dismissed. (R.T. p. 65). It is not properly in issue here.

(2) Validity of presumption

Appellants next submit that the trial court committed reversible error by instructing the jury as follows:

> "I instruct you that if from the evidence you find beyond a reasonable doubt that the Government's Exhibits 1 through 48 contain marihuana, and if you find beyond a reasonable doubt further that such marihuana

was seized by Government officers within the State of Arizona, then from these findings you would be authorized to draw the inference and to find that the marihuana was imported into the United States of America contrary to law. Of course, as against that inference there is a possible contrary inference which you might draw, that is, that the marihuana was not imported contrary to law."

This instruction was authorized by 21 U.S.C. § 176a which reads in pertinent part:

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." 3/

Such presumption or statutory inference was held constitutional by this court. Costello v. United States, 324 F.2d 260, 263-64 (1963), cert. denied, 376 U.S. 930 (1964); Caudillo v. United

States, 253 F.2d 513, cert. denied sub nom. Romero v. United States, 357 U.S. 931 (1958). Nine days prior to appellants' trial, however, the Supreme Court in Leary v. United States, 395 U.S. 6 (1969), held unconstitutional the portion of the § 176a presumption which authorizes the jury to infer from a defendant's possession of marihuana that the defendant knew of the unlawful importation. The Court specifically declined to decide the question of the validity of that part of the presumption which authorizes the jury to infer from a defendant's possession of marihuana that it was imported illegally. 395 U.S. at 37. See also United States v. Vansant, supra. We reach this question and reaffirm our determination in Costello and Caudillo that this part of the presumption is constitutional.

In Tot v. United States, 319 U.S. 463, 467-68 (1943), the Supreme Court, drawing from Mobile, J. & K.C. R.R. v. Turnipseed, 219 U.S. 35, 43 (1910), that "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." See also United States v. Romano, 382 U.S. 136, 139 (1965); United States v. Gainey, 380 U.S. 63, 66 (1965). In Leary, supra, the Court stated "that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved

fact on which it is made to depend." 395 U.S. at 36. Applying this "more likely than not" test, even assuming it to be stiffer than the Tot standard,[4] we hold that the presumption is valid.[5]

The District Judge here analyzed for the jury the essential elements of the offense charged in the indictment, "each of which the Government must prove beyond a reasonable doubt." (R.T. 153). First, that the marihuana was imported into the United States contrary to law; second, that the accused knowingly received or concealed or facilitated the transportation or concealment of the marihuana; and, third, that at the time the accused so received or concealed or facilitated the transportation or concealment of the marihuana, the accused then and there knew that the marihuana had been imported into the United States contrary to law.

The court then, again, told the jury that the Government must prove "each of these essential elements beyond a reasonable doubt." Finally, in instructing upon the inference of importation he was careful to qualify his statement by concluding at this point

> "Of course, as against that inference [of illegal importation] there is a possible contrary inference which you might draw; that is, that the marihuana was not imported contrary to law." (R.T. p. 154).

With respect to this latter inference, there was no evidence offered to suggest that the contraband here was from any domestic source.

In Leary, supra, the Court held that a jury cannot infer a defendant's knowledge of importation of marihuana from possession. The Court said, "[I]t would be no more than speculation were we to say that even as much as a major-

ity of possessors 'knew' the source of their marihuana." 395 U.S. at 53. The Court made it clear that this knowledge presumption was invalidated because of its speculative and subjective nature.[6] The importation presumption under consideration here, in contrast, rests upon the objective, convincing evidence that far more than half of the marihuana . . . smoked in the United States - perhaps more than ninety percent - is illegally imported into the country. This evidence is detailed in Leary, supra, 395 U.S. at 39-43.[7] The Court there summarized:

> "[T]he materials which we have examined point quite strongly to the conclusion that most domestically consumed marihuana is still of foreign origin. During the six years 1962-1967, some 79% of all marihuana seized by federal authorities was seized in attempted smuggling at ports and borders. The Government informs us that a considerable part of the internally seized marihuana bore indications of foreign origin. While

> it is possible that these facts reflect only the deployment of federal narcotics forces, rather than the actual proportion of imported to domestic marihuana, almost all of the authorities which we have consulted confirm that the preponderance of domestically consumed marihuana is grown in Mexico." 395 U.S. at 41-42. (Footnotes omitted.)

Thus, while a trier of fact more likely than not will be unable to adjudge the state of mind of a marihuana possessor to determine whether he knew the origin of his marihuana, the trier of fact can rely upon authoritative, empirical evidence that the origin of the marihuana was far more likely than not to have been foreign. 8/

Our result is in accord with that reached in United States v. Adams, 293 F.Supp. 776 (S.D.N.Y. 1968), which, presaging Leary, declared unconstitutional the knowledge part of the presumption but upheld the importation part. The

Court said:

> "The difficult question is whether importation should be inferable from possession alone. The less difficult question is whether possession alone should warrant an inference of knowledge of importation. This court has resolved grave doubts on the first question in favor of deferring to the always weighty judgment of the Congress." 293 F. Supp. at 784.

The Supreme Court has likewise emphasized that "in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily." Leary, supra, 395 U.S. at 36. See also United States v. Gainey, supra, 380 U.S. at 67.

(3) Cruel and unusual punishment

Appellants contend that the statutory requirement of a mandatory minimum sentence of five years imprisonment imposed under 21 U.S.C. § 176a violates the Eighth Amendment's prohibition of cruel and unusual punishment in that the

sentence holds no reasonable relationship to the severity of the crime or to other criminal penalties. This argument has been resolved against appellants in Bettis v. United States, 408 F.2d 563, 569-70 (9th Cir. 1969), which we decline to overrule.

(4) Search and seizure

Appellants next claim that the trial court erred in denying their motion to suppress the marihuana on the ground that it was the product of an unlawful, warrantless search. Authorized officers of the Immigration and Naturalization Service, such as those here, were empowered, without a warrant, to stop appellants and search their vehicle for smuggled aliens. 8 U.S.C. § 1357; United States v. Miranda, ___ F.2d ___ (9th Cir. April 24, 1970). In this instance the vehicle was a station wagon

and a flashlight examination from the outside disclosed a large hump covered with a tarpaulin which was large enough to conceal a human being. (R.T. p. 41.) Upon discovery of what they believed to be contraband, they had sufficient probable cause to detain appellants pending the arrival of customs agents. The customs agents had probable cause to search appellants' vehicle, to seize the marihuana in plain sight and to arrest appellants without a warrant. See Carroll v. United States, 267 U.S. 132, 153 (1925). Cf. Chimel v. California, 395 U.S. 752, 764 n. 9 (1969). "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." Harris v. United States, 390 U.S. 234, 236 (1968).

We have considered appellants' other contentions and find them without merit. The trial court did not abuse its discretion in refusing to grant appellants a continuance for the purpose of scrutinizing the opinion in Leary v. United States, supra, announced some nine days prior to the commencement of trial. Any error committed by the court in the admission or exclusion of evidence was harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18, 24 (1967). The court did not err in refusing to direct a verdict of acquittal.

The judgment is affirmed.

Footnotes

1. The immigration officers allegedly stopped the car because the driver, Avey, wore a mustache and cowboy hat and the vehicle was of a type commonly used by smugglers of aliens.

2. See, e.g., 26 U.S.C. §§4741, 4751-53, 4755.

3. The court while correctly instructing the jury on the essential elements of the crime including the necessity of proof of knowledge of importation contrary to law, was careful not to give an instruction permitting a presumption of knowledge based upon possession.

4. "The Leary language represents some stiffening of the absolute minimum degree of rational connection which the Court has expressed as essential to the validity of a statutory criminal presumption." Note, 83 HARVARD L. REV. 103, 107 (1969).

5. We decline to decide whether this, or any other, presumption must be adjudged by "the more exacting reasonable-doubt standard normally applicable in criminal cases." Turner v. United States, 396 U.S. 398, 416 (1970). See also Leary, supra, 395 U.S. at 36 n. 64; United States v. Adams, 293 F. Supp. 776, 783-84 (S.D.N.Y. 1968); Note, 83 HARVARD L. REV. 103, 108-10 (1969). CE. In re Winship, ___ U.S. ___, ___ (Mar. 31, 1970).

6. "[O]ur holding that the § 176a 'knowledge' presumption is unconstitutional rests entirely upon a detailed inquiry into the available facts about the state of mind of marihuana users." (Emphasis supplied.)

* * * * *

"Even if we assume that the previously assembled data are sufficient to justify the inference of illegal importation, see supra, at 44, it by no means follows that a majority of marihuana possessors 'know' that their marihuana was illegally imported."

* * * * *

The teachings of Tot, Gainey and Romano "require that it be determined with substantial assurance that at least a majority of marihuana possessors have learned of the foreign origin of their marihuana through one or more of the ways discussed above." 395 U.S. at 45 n, 92, 46, 52.

7. This evidence may be updated by the following information obtained on April 3, 1970 from John E. Ingersoll, Director, Bureau of Narcotics and Dangerous Drugs:

"A recent inquiry of our Regional Office in Mexico City concerning marihuana distribution systems reveals that the majority of Mexican marihuana emanates from independent operators from the growth areas primarily in the Mexican States of Sinaloa, Sonora, Chihuahua, Durango, Neuogleon, Michoacan, San Luis Potosi, Guerrero, Jalisco, Nayarit,

and Baja California. The traffickers utilize male and female couriers, shipments of industrial products, shipments of consumer goods, loaded vehicles and private airplanes to smuggle the contraband into the United States. Recently, large numbers of Americans have proceeded to Mexico in order to obtain large quantities of marihuana for transportation back to the United States and the arrest of American suspects in Mexico has increased considerably.

"Perhaps as high as 90% of the marihuana seized by Federal authorities is either at the Mexican border or in States bordering Mexico. I must add, however, that the premise set forth in footnotes 89 and 90 of the Leary case, with respect to not finding sizeable quantities of domestically grown marihuana in our illicit traffic, may no longer be true. We have received reports that many of the California traffickers have sent persons to the Central States to acquire marihuana from wild growth. It is significant to note that during 1969, there were over 150 persons arrested in Kansas alone for harvesting marihuana, most of whom were not residents of that State.

"Although we have no precise computations as to what quantities are obtained from domestic growth,

> I am inclined to think that in view of recent trends we could not support the statement in the Leary case which concluded that "Third and last, reports of the Bureau of Narcotics and testimony of its agents indicate that in its far-reaching investigations the Bureau has never encountered a system of distributing sizeable quantities of domestically grown marihuana."

8. The validity of the use of the presumption here draws strength from the geographical location as well as from the statistical information set out in Leary. If the principal areas of domestic growth are the central states such as Illinois and Minnesota, Leary, supra, 395 U.S. at 43 n. 86, and Kansas, n. 7, supra, it is unlikely that this marihuana in an automobile traveling north away from the Mexican border and within twelve miles of it was hauling domestic marihuana. Moreover, the quantity consisting of forty-eight packages weighing approximately eighty pounds is still another buttress of proved fact to support presumed fact, as is the manner of packaging which was characteristic of marihuana brought in from Mexico. (R.T. p. 4, 36)

F I L E D
Jul 17, 1970
WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR JOSEPH AVEY and LARRY RICHARD DEAN, Appellants,	)	No. 24,730
v.	)	ORDER DENYING PETITION FOR REHEARING EN BANC
UNITED STATES OF AMERICA, Appellee.	)	

Before: JERTBERG, CARTER and TRASK, Circuit Judges

The petition of appellant for a rehearing en banc is denied.

All circuit judges have been advised of appellant's petition for rehearing en banc, and none has voted for a rehearing en banc. Therefore, the petition for rehearing en banc is rejected.

21 U.S.C. § 176a. Smuggling of marihuana; penalties; evidence; definition of marihuana.

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent

offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of

1954. Feb. 9, 1909, c. 100, §2(h), as added July 18, 1956, c. 629, Title I, §106, 70 Stat. 570.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 1970, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to James Wilkes, Deputy U. S. Attorney, P. O. Box 1951, Tucson, Arizona, Counsel for Appellee. I further certify that all parties required to be served have been served.

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Counsel for Appellants-
Petitioners

No. 541

In the Supreme Court of the United States

OCTOBER TERM, 1970

ARTHUR JOSEPH AYES AND LARRY HOWARD DEAN,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 551

ARTHUR JOSEPH AVEY AND LARRY RICHARD DEAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. i–xix) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1970. A petition for rehearing *en banc* was denied on July 17, 1970 (Pet. App. xx). On August 17, 1970, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

404-261—70

QUESTIONS PRESENTED

1. Whether, in a trial for concealing unlawfully-imported marihuana, it was error to charge that the jury could properly infer unlawful importation of marihuana if satisfied that the evidence showed petitioners were in possession of marihuana in Arizona.

2. Whether the sentence of five years' imprisonment constituted cruel and unusual punishment.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioners were convicted of receiving, concealing and facilitating the transportation of forty-eight bricks of marihuana, knowing that they had been unlawfully imported into the United States, in violation of 21 U.S.C. 176a. On June 23, 1969, each was sentenced to imprisonment for five years. The court of appeals affirmed.

The evidence showed that at approximately 5:30 p.m. on February 23, 1969, petitioners drove a 1955 Buick station wagon across the Mexican border into the United States at Nogales, Arizona. A customs search at the border uncovered no contraband. However, the searching agent recognized the distinct odor of marihuana in the vehicle (III Tr. 19–29).[1]

Shortly before 8 p.m. that same evening petitioners were spotted by two immigration inspectors heading north from Nogales on Route 89 in the same vehicle.

[1] A separately paginated three-volume record has been filed with the Clerk of this Court. Volume II contains the transcript of a hearing on a motion to suppress evidence. Volume III contains the transcript of trial.

Because of the darkness, the inspectors were able to catch only a glimpse of the driver, petitioner Avey. They noticed that he had a mustache and wore a Stetson hat, giving the appearance of being of Mexican extraction (III Tr. 31–32). Believing that petitioners might be engaged in smuggling aliens in the back of the station wagon, the agents decided to make a spot check of the vehicle (II Tr. 5–6, 34; III Tr. 31–32, 50–51). They flagged down petitioners' car. Petitioner Avey left the station wagon and walked over to Inspector Whitaker to ascertain why he had been stopped. While Whitaker inquired of Avey's citizenship, Inspector Mathyer shined his flashlight into the rear of the station wagon. He saw a tarpaulin, under which brick-shaped packages had been placed in a haphazard manner, causing the tarpaulin to bulge and partially expose several packages wrapped in a red cellophane material (III Tr. 53). Because of their prior experience with similarly wrapped packages of that size, the inspectors strongly believed that they contained marihuana (II Tr. 4–5; III Tr. 34, 53). Petitioner Dean was then ordered out of the station wagon and both petitioners were frisked and handcuffed; a customs agent was summoned. Agent Holgerson arrived within a half-hour. He removed one of the packages from the station wagon and verified that its contents were marihuana (III Tr. 57). A search of the station wagon later that evening, after it had been impounded, uncovered 48 bricks of marihuana, weighing approximately 80 pounds (III Tr. 62–63, Pros. Exh. 1–48). The customs

agent estimated the value of marihuana in the United States at $100 per pound (III Tr. 104–105).

ARGUMENT

1. In its closing charge, the trial court instructed that, if the jury found beyond a reasonable doubt that the packages taken from the station wagon contained marihuana seized within the State of Arizona, it could properly infer that the marihuana had *in fact* been imported contrary to law (Pet. 8, Pet. App. iv–v). As to *knowledge of* illegal importation—the aspect of the statutory presumption struck down in *Leary* v. *United States*, 395 U.S. 6[2]—the court unassailably charged that such *knowledge* had to be separately found as a distinct element of the offense. Petitioners object to the inference of illegal importation, based on the presence of the marihuana in Arizona under the circumstances of this case, on two grounds: (1) they contend such an inference cannot constitutionally be made because it deprives the defendant of certain safeguards, such as freedom from compulsory self-incrimination and the presumption of innocence; (2) they claim that unlawful importation cannot rationally be inferred from the simple fact that the marihuana was present in Arizona in this case.

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[2] 21 U.S.C. 176a provides in pertinent part:

> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

In *Leary*, after noting the two elements of the presumption, this Court did not reach the question of the validity of the importation inference. 395 U.S. at 37.

a. The first argument amounts to an attack upon all legislatively created presumptions in the criminal law. See *Turner* v. *United States*, 396 U.S. 398, 429–434 (dissenting opinion of Mr. Justice Black). This Court, however, has consistently upheld the validity of statutory presumptions when there exists a rational connection between the fact proved and the ultimate fact to be presumed. See, *e.g.*, *Tot* v. *United States*, 319 U.S. 463; *United States* v. *Gainey*, 380 U.S. 63; *United States* v. *Romano*, 382 U.S. 136. As recognized in *Yee Hem* v. *United States*, 268 U.S. 178, 185:

> The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

Here, the court in its closing charge did state that defendants were innocent until proven guilty and that the burden of proving guilt was upon the government. The instruction that possession of marihuana authorized the jury to infer, if it so desired, that the marihuana was unlawfully imported, did not nullify the effect of the other instructions, particularly since the court at the same time carefully informed the jury that "there is a possible contrary inference which you might draw; that is, that the marihuana was not imported contrary to law" (Pet. App. ix).

b. On petitioner's second point, the court of appeals accurately observed that the rationality of the inference of importation has been uniformly upheld (Pet. App. xii–ix). Moreover, it finds strong support in recent statistics showing that, while sizeable quantities of domestically grown marihuana have been seized by federal officials (cf. *Leary* v. *United States*, 395 U.S. 6, 43 n. 90), the vast preponderance of confiscated marihuana is of foreign origin (Pet. App. x–xi). This is particularly true of marihuana seized in States bordering Mexico. See *United States* v. *Adams*, 293 F. Supp. 776, 782 n. 12 (S.D.N.Y.). The statutory presumption of unlawful importation from proof of possession in these circumstances, does no more than "accord to the evidence, if unexplained, its natural probative force." *United States* v. *Gainey*, 380 U.S. at 71.

Here petitioners when first sighted were but twelve miles from the Mexican border (Tr. 31–32), traveling north in a station wagon which had crossed the border

only two hours before, and which then carried the smell of marihuana, although none could be found at the time of the border search. To allow the jury to infer from proof of possession of a large quantity of distinctly packaged marihuana at that time and place that the marihuana was imported contrary to customs law simply accords the circumstantial evidence in this case a common sense interpretation. Thus, the propriety of the inference in this case was justifiable apart from the statute, and does not depend upon a demonstration that the importation inference would be valid in all situations.

2. Petitioners' contention, that the imposition of a mandatory minimum prison sentence of five years, with no possibility of suspension or probation, constitutes cruel and unusual punishment, has been consistently rejected by the courts. *United States* v. *Drotar*, 416 F. 2d 914 (C.A. 5), certiorari pending, No. 5111, this Term; *Bettis* v. *United States*, 408 F. 2d 563 (C.A. 9); *United States* v. *Ward*, 387 F. 2d 843 (C.A. 7). Whether or not desirable as a matter of legislative policy, mandatory minimum sentences are far from unusual in this country's penal systems. See *United States* v. *Chow*, 398 F. 2d 596 (C.A. 2). The sentence to five years' imprison-

[3] While the court's instruction referred to possession in the "State of Arizona", rather than in the specific location within the state disclosed by the evidence, no request was made for an instruction more geographically limited. All of the evidence established the location of petitioners' possession of marihuana at Milepost 13. There is, accordingly, no possibility that petitioners' convictions could have been founded on possession somewhere in Arizona farther from the border.

ment for concealing and facilitating the transportation of 80 pounds of marihuana unlawfully imported into the United States is not so far out of proportion that it shocks a balanced sense of justice and therefore constitutes a violation of the Eighth Amendment. *Halpin* v. *United States*, 295 F. 2d 458 (C.A. 9). This is so even in light of the present public attention given to marihuana and the recognized need for further research on its harmful effects. Absent conclusive scientific evidence tending to undermine the legislative conclusion that conduct such as that by petitioners presents a danger to society warranting the type of punishment imposed, the five-year mandatory sentence cannot be considered unconstitutional. See *Powell* v. *Texas*, 392 U.S. 514, 531–537.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970